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No. 84-815

In the Supreme Court of the United States

OCTOBER TERM, 1984

LAWRENCE W. BLACKMON, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND
PINEY WOODS APARTMENTS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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8 pp

TABLE OF AUTHORITIES

Page

Case:

Salinger v. *Black*, 68 Ark. 449, 60 S.W. 229 4

Statute:

12 U.S.C. 1715*l* 1

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Petitioners seek review of the court of appeals' determination that there was sufficient evidence to support the tolling of the state statute of limitations under the fraudulent concealment rule.

1. This suit arises out of a contract between respondent Piney Woods Apartments, Inc. (Piney Woods) and petitioner Smithwick-Blackmon, Inc., for the construction of a multi-family housing project in Pine Bluff, Arkansas (Pet. App. 2a).[1] Petitioner Blackmon & Associates is an affiliate of Smithwick-Blackmon (*id.* at 12a), and petitioner Lawrence W. Blackmon, Jr. is a principal in the two companies (*ibid.*).

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[1]The mortgage on the project was insured by the Department of Housing and Urban Development pursuant to 12 U.S.C. 1715*l* (see Pet. App. 11a).

On June 12, 1969, Smithwick-Blackmon, in concert with Blackmon & Associates and Lawrence Blackmon, submitted to Piney Woods a certified statement of all actual costs connected with the construction of the housing project (Pet. App. 2a, 13a). Petitioners knew that this statement falsely inflated the costs of construction by at least $75,000 (*ibid.*). In reliance on the false statement, Piney Woods obtained mortgage insurance from the Department of Housing and Urban Development in an amount $75,000 greater than was authorized by law, and paid petitioners the inflated amount reflected in the cost statement (*id.* at 14a-15a). On July 12, 1974, a sealed criminal indictment of Lawrence Blackmon was presented to the United States District Court for the Eastern District of Arkansas (*id.* at 2a). Blackmon pleaded guilty to knowingly and intentionally submitting a false statement of costs for the purpose of influencing the Department of Housing and Urban Development (*ibid.*).

On July 7, 1977, the United States commenced this action for breach of contract and for fraud and deceit on its own behalf and as assignee of Piney Woods' claims against Smithwick-Blackmon and Lawrence Blackmon (Pet. App. 2a). Piney Woods subsequently was joined as a plaintiff and asserted a claim against Blackmon & Associates (see *id.* at 21a-24a). The district court held in favor of the United States and Piney Woods (*id.* at 21a, 24a). It rejected petitioners' claim that the action was barred by the statute of limitations, finding that the statute was tolled by petitioners' concealment of their fraud until July 12, 1974, the date that the criminal indictment was unsealed (*id.* at 16a-17a). The court found petitioners liable for fraud and deceit (*id.* at 17a-20a), and entered two alternate judgments, one in favor of the United States and against Smithwick-Blackmon and Blackmon, and one in favor of Piney Woods and against Blackmon & Associates (*id.* at 22a-24a). Each judgment was for the full amount of damages — $75,000 —

but the district court's order stated that the total damages paid by petitioners would not exceed $75,000, exclusive of interest (*id.* at 23a).

Petitioners appealed and argued that the district court had not properly applied the fraudulent concealment rule. The court of appeals agreed, stating that there was no record evidence to support the district court's finding that the United States and Piney Woods "became aware of the cause of action * * * on the date of the unsealing of the criminal indictment of Lawrence Blackmon" (Pet. App. 3a). The court of appeals directed the district court to "dismiss the cause of action brought by the United States against Blackmon and [Smithwick-Blackmon] as untimely filed" (*id.* at 4a). The court did not direct the dismissal of Piney Woods' action against Blackmon & Associates.

Petitioners filed a petition for rehearing in the court of appeals stating that the court's opinion indicated that "there is no record evidence sufficient to toll the statute of limitations as to any claims against [Blackmon & Associates] and to exclude [Blackmon & Associates] from the dismissal would be an illogical result of this appeal" (Pet. App. 29a). The government previously had indicated that it intended to file a petition for rehearing (see *id.* at 5a), and the court of appeals directed the government to respond to petitioners' rehearing petition when it filed its own rehearing petition (*id.* at 6a). In this filing, the government brought to the court's attention record evidence — in the form of the unchallenged affidavit of an officer and director of Piney Woods — showing that Piney Woods first became aware of the contract overcharge when the indictment was unsealed (Pet. for Reh'g 3). See page 5, *infra*. In response to petitioners' rehearing petition, the government stated (Pet. for Reh'g 8-9 (emphasis added)):

> [I]f this Court intended to reverse the judgment entered in the district court against all three appellants, then appellee has no objection to appellants' petition for rehearing. *For the reasons stated above, however, we oppose the premise upon which appellants seek rehearing, that there is no record evidence to support the judgment of the district court.*

The court of appeals denied both petitions for rehearing (Pet. App. 7a). Petitioners then attempted to file a "Supplemental Petition for Rehearing By Panel And Motion To Amend Or Clarify Notice Of Appeal" again seeking the dismissal of the action against Blackmon & Associates (see *id.* at 32a-39a), but leave to file that document was denied by the court of appeals (*id.* at 8a).

2. The decision of the court below not to disturb the judgment entered against Blackmon & Associates raises no significant legal question and does not conflict with any decision of this Court or of any other court of appeals. Review of this fact-bound issue by this Court is not warranted.[2]

In addition, the decision of the court of appeals is correct. Petitioners assert (Pet. 5-6) that the court of appeals should have ordered the dismissal of the claim against Blackmon & Associates because there was no evidence showing when Piney Woods became aware of the fraud.[3] Petitioners raised this same argument in their petition for rehearing (see Pet.

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[2]The government has not sought review of the decision of the court below directing the dismissal of the action brought by the United States against Blackmon and Smithwick-Blackmon.

[3]Under Arkansas law, which governed Piney Woods' claim, a plaintiff asserting that the statute of limitations was tolled by the concealment of the cause of action must show when he first discovered the concealed facts. *Salinger* v. *Black*, 68 Ark. 449, 455, 60 S.W. 229, 231 (1900); see Pet. App. 3a.

App. 28a-30a). The government's response pointed out (Pet. for Reh'g 3) that the manager of Piney Woods, who also was an officer and director of the company, stated in an unchallenged affidavit filed in this case:

> To my knowledge, the first time I or any member of the management of Piney Woods was aware of the fact that there was overcharging on the construction contract for the Piney Woods Apartments was when I learned of the overcharging via the media's reporting of the indictment of Larry Blackmon on or about July 12, 1974.

Thus, petitioners' contention that Piney Woods' complaint was filed beyond the date permitted by the statute of limitations was demonstrably incorrect, because the affidavit constituted record evidence showing that Piney Woods did not become aware of the fraud until the date the indictment was unsealed. Since the district court's decision that the statute of limitations was tolled as to Piney Woods' claim therefore was correct, the court of appeals properly refused to order the dismissal of that claim.[4]

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[4]Petitioners are incorrect in their assertion (Pet. 5-6) that this determination is inconsistent with the dismissal of the claims filed by the United States. The affidavit provided evidence of Piney Woods' knowledge and therefore permitted the tolling of the statute of limitations as to Piney Woods' claim. The court of appeals obviously concluded that the affidavit did not justify the same result with respect to the government's claims because it contains no information regarding the government's knowledge of the fraud.

Petitioners' arguments (Pet. 7-11) regarding the notice of appeal are irrelevant. There is no indication that the decision of the court below was based upon a defect in the notice of appeal.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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